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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

Federal-State Joint Board on
Universal Service

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CC Docket No. 96-45
FCC 96J-3

To: The Commission



REPLY COMMENTS OF CELPAGE, INC.

Frederick M. Joyce
Its Attorney

JOYCE & JACOBS, Attys. at Law, L.L.P.
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036
(202) 457-0100

Date: January 10, 1997

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REPLY COMMENTS OF CELPAGE, INC.

Celpage, Inc. ("Celpage, Inc."), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Reply Comments regarding the Federal-State Joint Board on Universal Service Recommended Decision ("Recommended Decision") in the above-captioned proceeding.

I. Summary of Pertinent Comments

The large number of Comments that have been filed in this proceeding reflects the importance and the great impact on society that the implementation of universal service will have on both carriers and customers. The Federal Communications Commission ("FCC" or "Commission") has the ultimate responsibility of advancing universal service, while ensuring that in its implementation, the Communications Act of 1934, as amended ("the Act"), the Telecommunications Act of 1996 ("the Telecom Act"), Congressional intent, and the Constitutional rights of carriers are not violated.

All of the Commenters agree that the implementation of universal service must be accomplished in an equitable and nondiscriminatory manner as required by Section 254(d) of the Telecom Act. See 47 U.S.C. § 254(d). Several Commenters have noted, however, that the

Federal-State Joint Board's ("Joint Board") recommendations are not equitable, and discriminate against Commercial Mobile Radio Services ("CMRS") providers. Celpage concurs with those Commenters who conclude that requiring CMRS providers, who are not eligible to receive universal support, to contribute to the universal service fund is unconstitutional, unfair and discriminatory to those CMRS providers.

Several Commenters also addressed the inequitable outcome that would result from the Joint Board's restricted definition of "eligibility" to receive universal service support. For example, one Commenter asserted that since paging companies will not be able to provide the host of bundled services recommended by the Joint Board as "universal service," requiring them to contribute to a universal service fund would amount to unfair subsidization of local exchange carriers ("LECs") and other eligible carriers by paging companies. Most CMRS Commenters agree that it would be inequitable and discriminatory to require paging companies to contribute to universal service at the same level as eligible carriers; although they disagree on what "discount" should be available to CMRS providers.

There is a consensus among the CMRS Commenters that since the States are preempted from regulating any aspect of CMRS rate or entry under Section 332 of the Act, States cannot require CMRS providers to contribute to State universal service funds (at least until such time as CMRS becomes a viable substitute for local landline service). The Joint Board and the FCC cannot ignore the statutory language of the Act, and must hold any State imposition of universal service taxes on CMRS providers to be invalid.

II. Requiring Paging Companies to Contribute to Universal Service Mechanisms Violates Their Constitutional Rights.

Imposition of universal service "taxes" on paging companies is unconstitutional because

paging companies receive no benefit whatsoever from the universal service program. The Paging and Narrowband PCS Alliance ("PNPA") agreed with Celpage that to require all carriers to contribute to the universal service fund without regard to the benefits those carriers receive is an unconstitutional taking. PNPA Comments at p. 5. PNPA also agreed that the U.S. Constitution prohibits the taking of private property for public use without just compensation. Id.

Nevertheless, Celpage disagrees with PNPA's statement that "all telecommunications carriers get some benefit from the increased access to telecommunications services fostered by the universal service program." PNPA Comments at p. 6, n.13. Paging companies generally charge their customers fixed monthly fees, regardless of the number of "calls" that are sent to a paging unit.¹ For example, a paging company with 10 subscribers will generate the same amount of revenue whether one or one hundred calls are made to each paging unit. Therefore, paging companies are generally unaffected by the amount of "telephone" traffic sent to a paging system, and receive no noticeable benefits from increased access to telecommunications services. Because there is no empirical proof that paging companies will receive any benefits from the universal service fund, it is unconstitutional to require them to contribute to it.

Several Commenters agreed with Celpage that the narrow definition of "eligible" carriers recommended by the Joint Board precludes most CMRS providers from being eligible to receive universal service support. See Arch Communications Group, Inc. ("Arch") Comments at p. 4; Reed, Smith, Shaw & McClay ("Reed") Comments at p. 11, and PNPA Comments at p. 2. In

¹ The sole exception to this is a surcharge for "overcalling" to a paging unit; however, those charges are only a nominal portion of overall paging revenues. Moreover, overcalling surcharges underscore the point that paging companies typically try to place reasonable limits on the number of calls placed to a paging unit each day, to alleviate traffic and network capacity problems.

addition, while some CMRS providers may in the future be able to provide all services necessary to become eligible for universal service support, paging companies, due to their very specialized messaging service, are unlikely in the foreseeable future to be able to provide the services defined by the Joint Board as "universal service." See e.g., Reed Comments at p. 11.

Since a tax must confer some benefit, however small, on the party paying the tax for the tax to be legitimate,² and paging companies are unlikely to receive any direct or even indirect benefit from the universal service program, paging companies cannot be required to contribute to the universal service fund in violation of their Constitutional rights.

III. Requiring Paging Companies to Contribute to Universal Service Mechanisms Violates the Telecom Act

Several Commenters concur with Celpage's analysis, and concluded that requiring paging companies to contribute to the federal universal service fund on the same basis as eligible carriers violates the principles of "equitable and nondiscriminatory" contributions embodied in Section 254(d) of the Telecom Act. See 47 U.S.C. § 245(d); and e.g., Reed Comments at p. 10 and Paging Network, Inc. Comments at p. 12. Several Commenters also agreed that for contributions to be equitable and nondiscriminatory, the FCC must take into account the ability of a carrier to be eligible for universal service support, and the relative burden that would be placed on the particular carrier. See e.g., Paging Network, Inc. Comments at p. 4. For instance, Paging Network, Inc. observed that since messaging service is not intended or designed to provide access to voice-grade service as defined by the Joint Board, and it cannot support each

² See U.S. CONST. amend. V and amend. XIV. See also Dane v. Jackson, 256 U.S. 589 (1921); Wisconsin v. J.C. Penny Co., 311 U.S. 435 (1940); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905), and, Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897 (10th Cir. 1947).

of the designated service elements, the proposed universal service fund will place messaging providers at a competitive disadvantage by forcing them to contribute at the same level to a fund that will disproportionally benefit their competitors. Paging Network, Inc. Comments at p. 12.

PNPA accurately describes how the Joint Board's recommendation places discriminatory and unfair burdens on messaging providers. One-way messaging companies compete against other telecommunications service providers that bundle messaging services with other services eligible for universal service support, offer messaging service identical to one-way paging, or offer substitutable service offerings. PNPA Comments at p. 4. Therefore, the Joint Board's proposed contribution formula will unfairly skew the market and create inequitable results, as competitors that provide each of the "core" services eligible for support under the universal service fund, will be entitled to recover from the fund their costs for these services, including services that directly compete against paging companies. These "eligible" competitors will be able to use federal subsidies to enhance their revenues, increase their number of subscribers, and allocate their costs over a larger customer base; while paging carriers will have none of these benefits. PNPA Comments at p. 4-5.

Eligible carriers receiving subsidies from the fund will be at a distinct competitive advantage over those carriers that provide some competitive services, but are not entitled to federal subsidies. Since paging companies will not be eligible for universal service subsidies, a tax imposed upon them will simply amount to an inequitable subsidization by paging carriers of incumbent LECs and other carriers that compete against paging companies. This result is contrary to the equitable and nondiscriminatory policy of Section 254(d) of the Telecom Act.

**IV. Section 332 of the Act Preempts States From Requiring
CMRS Providers to Contribute to Universal Service.**

Many of the Commenters observed that the Commission has regularly stated that Section 332(c)(3)(A) of the Act wholly displaces State regulation of entry and rates. See Comments of Cellular Telephone Industry Association ("CTIA"); Paging Network; and Personal Communications Industry Association ("PCIA"). Celpage concurs that State imposition of universal service fees on CMRS providers will inflict unlawful rate and entry barriers on CMRS operators, in violation of FCC rulings and Congressional edicts. Consequently, CMRS Commenters agree that States cannot require CMRS providers to contribute to State universal service support mechanisms. See e.g., Airtouch Communications, Inc. Comments at p. 30.

**V. If Paging Companies Are Compelled to Contribute,
Constitutional Fairness Requires That it be on a Weighted Basis.**

PCIA agrees with Celpage that "pricing considerations are particularly relevant to the ability of wireless carriers to compete in the telecommunications marketplace, since any increase in wireless rates will decrease the demand from consumers." PCIA Comments at p. 8. Some Commenters also agree with Celpage that pricing concerns are particularly relevant to paging companies since most paging companies today operate at barely break-even operating margins, or worse. See e.g., Reed Comments at p. 11, and Arch Comments at p. 5. Therefore, if in violation of FCC precedent and Section 254's nondiscriminatory requirements, paging companies are nevertheless compelled to contribute to the universal service fund, those contributions should be made on a weighted or discounted basis. See e.g., PNPA Comments at

p. 6; Paging Network Comments at p. 10, and Celpage Comments at p. 8-10.

VI. Paging Companies' Contributions, if any, Should be Based on a Percentage of Net Income, not Gross Revenue.

Many CMRS Commenters agree with Celpage that paging companies face high costs, recurring expenses, and fierce competition from numerous CMRS carriers and other telecommunications service providers in every major market. Because of these market conditions, the majority of the nation's largest paging companies today currently operate at a loss. See e.g., Celpage Comments at p. 11. In addition, because of this highly competitive market, paging companies will not be able to pass additional costs from universal service fees to their customers. Id. Therefore, paging carrier contributions based on net income, not gross revenue, would be far more equitable since it would allow paging companies to subtract expenses to reflect profits and better meet the demands of a competitive market. See Celpage Comments at p. 10-12.

VII. The Model Adopted for Federal Universal Service Payments will Impact State Universal Programs.

Several Commenters have noted that the Federal universal service program will influence the development and implementation of State universal service programs. See Comments of CTIA; Paging Network, and PCIA. Because the Federal universal service program will likely become a model for State programs, the FCC has a responsibility to ensure that its programs comply with statutory rules, FCC policies and the Constitutional rights of carriers. The Joint Board's Recommended Decision does not meet these legal standards, and should not become the model for state programs without substantial revisions, as suggested herein and in Celpage's Comments.

**VIII. The Comments of the Puerto Rico Telephone Company
are Based on Anti-competitive Strategies**

Celpage is uniquely qualified to reply to Comments filed by one particular local exchange carrier. Because Celpage is located in and operates from Puerto Rico, it has experienced first-hand how the Puerto Rico Telephone Company ("PRTC") treats competitive carriers, including CMRS carriers (PRTC provides paging and cellular services). Based on that experience, PRTC's claim that it is entitled to even greater universal service subsidies than most LEC's must be taken with a very large grain of salt.

PRTC has a well documented history of waste, inefficiencies, bloated bureaucracy, giveaways to obtain political benefits, and padded payrolls. Although it complains that Puerto Rico has one of the nation's lowest telephone penetration rates (PRTC Comments at p. 5), PRTC failed to note that it also has the most employees per telephone line of any telephone company in the United States. PRTC also has the dubious distinction of having the highest local interconnection charges of any LEC in the Nation.³ Thus, it is not for want of money or personnel that Puerto Rico has such a low penetration rate for basic landline service.

In addition, PRTC has fought competition in Puerto Rico in every forum. For example, PRTC was able to help pass a local "PR Telecommunications Act" which effectively handicaps local competition. PRTC has already publicly stated that it wants the competition to subsidize it for any revenue losses it experiences due to local competition. Just days after the new local law was enacted, PRTC unilaterally lowered its intra-island long distance prices in an obvious preemptive move resulting from the mere threat of competition. Had competition not been

³ Based on independent industry surveys.

possible, PRTC would never have made such price decreases on its own.

Thus, Celpage recognizes PRTC's desire to use "subscriberhip levels in a carrier's service area to determine whether the rates are presumptively affordable" (PRTC Comments at p. 2) as a clear attempt by PRTC to increase the cost of operations for other Telecommunications carriers. This will also effectively eliminate potential competition by increasing the other carrier's operational costs through a universal service tax, which would only go to subsidize PRTC's inefficient operations.

PRTC observes that subscriberhip levels in Puerto Rico are related to costs; but, they are also due to peculiar family social groups that preclude the need for one telephone for every family, since many families live in the same house. PRTC's own studies have reflected this fact for years.⁴ Celpage's concern is how the "affordability" category will be used to determine support mechanisms for universal service. If this category is used to restrict universal service support to any telecommunications carrier that does not meet an affordability criteria, Celpage supports it, since it would force carriers to lower their prices to the benefit of the public. This support, if in the form of a subsidy, should be limited to the difference between the carrier's cost to bring service to the subsidized customer (rural area, schools, hospitals), and an "efficient level" of cost on a national basis. On the other hand, if PRTC's proposal is left to the carrier's own costs, it would only perpetuate inefficiencies and could be used to increase the universal

⁴ For example, PRTC has a program to offer subsidies of 50% on the installation charges of new telephone service for persons without telephone service, or who have cancelled service for a minimum of three months, and who were participants in the Nutritional Assistance Program. In light of continued low penetration figures in P.R., presumably lowering the cost of service has not made much difference, confirming that there are other social factors involved.

service tax on other carriers and to preclude competition.

That is why PRTC's comment that the "support for eligible carriers in insular areas should be based on the incumbent local exchange carrier's embedded costs" (PRTC Comments at p. 3) cannot be upheld or given any consideration. This recommendation, if adopted, would only serve to support documented inefficiencies by the incumbent carrier, and increase the amount of subsidies that the incumbent carrier would receive from the universal service fund. Concomitantly, this would unfairly increase the contributions required from competitive carriers, thus reducing rather than enhancing competition. This would soon become a self generating engine to keep PRTC's prices unreasonably high, and would be in sharp contradiction to the objectives of the Telecom Act of 1996.

Conclusion

For these reasons and the reasons set forth in Celpage's Comments, Celpage respectfully requests that the FCC substantially modify the Joint Board's Recommended Decision before adopting its final declarations.

Respectfully submitted,
CELPAGE, INC.

By: 

Frederick M. Joyce
Its Attorney

JOYCE & JACOBS, Attorneys at Law, L.L.P.
1019 19th Street, N.W.
Fourteenth Floor - PH2
Washington, D.C. 20036
(202) 457-0100

January 10, 1997

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CERTIFICATE OF SERVICE

I, Regina Wingfield, a secretary with the law firm of Joyce & Jacobs, Attys. at Law, LLP, hereby certify that on this 10th day of January, 1997, copies of the foregoing Reply Comments of Celpage, Inc. were sent via first class U.S. mail, postage prepaid, to the following:

The Honorable Reed E. Hundt, Chairman *
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, D.C. 20554

The Honorable Laska Schoenfelder,
Commissioner
South Dakota Public Utilities Commission
State Capitol, 500 E. Capitol Street
Pierre, SD 57501-5070

The Honorable Rachelle B. Chong, *
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner *
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, D.C. 20554

The Honorable Julia Johnson, Commissioner
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

The Honorable Kenneth McClure,
Commissioner
Missouri Public Service Commission
301 W. High Street, Suite 530
Jefferson City, MO 65101

The Honorable Sharon L. Nelson, Chairman
Washington Utilities and Transportation
Commission
P.O. Box 47250
Olympia, WA 98504-7250

Martha S. Hogerty
Public Counsel for the State of Missouri
P.O. Box 7800
Jefferson City, MO 65102

Anna Gomez
Federal Staff Chair
Federal Communications Commission
2100 M Street, NW, Room 8617
Washington, DC 20036

Paul E. Pederson
State Staff Chair
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Lisa Boehley
Federal Communications Commission
2100 M Street, NW, Room 8605
Washington, DC 20554

Charles Bolle
South Dakota Public Utilities
State Capitol, 500 E. Capitol Street
Pierre, SD 57501-5070

Deonne Bruning
Nebraska Public Service Commission
300 The Atrium
1200 N. Street, P.O. Box 94927
Lincoln, NE 68509-4927

James Casserly, Senior Legal Advisor
Office of Commissioner Susan Ness
Federal Communications Commission
1919 M Street, Room 832
Washington, DC 20554

John Clark
Federal Communications Commission
2100 M Street, NW, Room 8619
Washington, DC 20554

Bryan Clopton
Federal Communications Commission
2100 M Street, NW, Room 8615
Washington, DC 20554

Irene Flannery
Federal Communications Commission
2100 M Street, NW, Room 8922
Washington, DC 20554

Daniel Gonzalez, Legal Advisor
Office of Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

Emily Hoffnar
Federal Communications Commission
2100 M Street, NW, Room 8623
Washington, DC 20554

L. Charles Keller
Federal Communications Commission
2100 M Street, NW, Room 8918
Washington, DC 20554

Lori Kenyon
Alaska Public Utilities Commission
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501

David Krech
Federal Communications Commission
2025 M Street, NW, Room 7130
Washington, DC 20554

Debra M. Kriete
Pennsylvania Public Utilities Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Diane Law
Federal Communications Commission
2100 M Street, NW, Room 8920
Washington, DC 20554

Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399

Robert Loubé
Federal Communications Commission
2100 M Street, NW, Room 8914
Washington, DC 20554

Samuel Loudenslager
Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203-0400

Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

Philip F. McClelland
Pennsylvania Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Michael A. McRae
D.C. Office of the People's Counsel
1133 15th Street, NW, -- Suite 500
Washington, DC 20005

Tejal Mehta
Federal Communications Commission
2100 M Street, NW, Room 8625
Washington, DC 20554

Terry Monroe
New York Public Service Commission
3 Empire Plaza
Albany, NY 12223

John Morabito, Deputy Chief
Accounting and Audits Division
Common Carrier Bureau- FCC
2000 L Street, NW, Suite 812
Washington, DC 20554

Mark Nadel
Federal Communications Commission
2100 M Street, NW, Room 8916
Washington, DC 20554

John Nakahata, Senior Legal Advisor
Office of Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

Lee Palagyi
Washington Utilities and Transportation
Commission
1300 South Evergreen Park Drive S.W.
Olympia, WA 98504

Kimberly Parker
Federal Communications Commission
2100 M Street, NW, Room 8609
Washington, DC 20554

Barry Payne
Indiana Office of the Consumer Counsel
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2208

Jeanine Potronieri
Federal Communications Commission
2100 M Street, NW, Room 8924
Washington, DC 20554

Michael Pryor
Federal Communications Commission
2100 M Street, NW, Room 8905
Washington, DC 20554

James Bradford Ramsay
National Association of
Regulatory Utility Commissioners
P.O. Box 684
Washington, DC 20044-0684

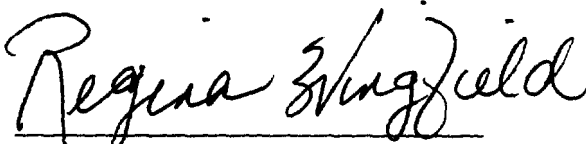
Brian Roberts
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Gary Seigel
Federal Communications Commission
2000 L Street, NW, Suite 812
Washington, DC 20554

Richard D. Smith
Federal Communications Commission
2100 M Street, NW, Room 8605
Washington, DC 20554

Pamela Szymczak
Federal Communications Commission
2100 M Street, NW, Room 8912
Washington, DC 20554

Lori Wright
Federal Communications Commission
2100 M Street, NW, Room 8603
Washington, DC 20554


Regina Wingfield

* denotes Hand Delivery